STATE OF MICHIGAN

COURT OF APPEALS

RICHARD SHEPARD, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED September 19, 2006
v	No. 261484 Oakland Circuit Court
M & B CONSTRUCTION, L.L.C., Defendant-Appellee/Cross-Appellant.	LC No. 02-041970-NO

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause for action in favor of defendant after a jury trial. Defendant cross-appeals the trial court's orders denying of its motions for summary disposition and motion for a directed verdict. We affirm the orders denying defendant's motions for summary disposition and for a directed verdict. However, we reverse the judgment of no cause for action and remand for a new trial.

Plaintiff sued defendant to recover damages for injuries that he suffered when he fell from the roof of a building on which he was working. Defendant, which was the general contractor for the construction of the building, had hired plaintiff's employer to provide carpentry work on the project. On appeal, plaintiff argues that the trial court's reinstruction of the jury erroneously defined a common work area. We agree.

This Court reviews de novo, as a question of law, whether jury instructions adequately and fairly state the applicable law and theories of the parties. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). In reviewing this issue, the instructions must be evaluated as a whole, rather than extracted piecemeal, to establish error. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id.* "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.* Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case, supra* at 6.

Generally, a general contractor is not liable for the negligence of an independent subcontractor and its employees. *Ormbsy v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d

320 (2004). An exception to this rule is the common work area doctrine as enunciated in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974).[1] *Id.* Pursuant to this exception, for a general contractor to be liable, a plaintiff must show that "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Id.* at 54-55. Regarding the fourth element, "[i]t is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area." *Hughes v PMG Building, Inc*, 227 Mich App 1, 5-6; 574 NW2d 691 (1997).

Here, after the trial court instructed the jury on the elements of the common work area doctrine, the trial court defined the fourth element, a common work area, as follows: "Now, when I use the word or term common work area, I mean an area where a significant number of employees of multiple subcontractors may be exposed to risk of danger. It's a situation where a number of subcontractors were all subject to the same risk or hazard." This language was, in part, a quote from footnote nine of *Ormsby*. Footnote nine of *Ormsby* provides, in relevant part:

> "This Court has previously suggested that the Court's use of the phrase "common work area" in *Funk, supra*, suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability. We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and *a situation where employees of a number of subcontractors were all subject to the same risk or hazard*." [Emphasis added.] [*Ormsby, supra* at 57 n 9, quoting *Hughes, supra* at 8.]

During its deliberations, the jury requested clarification of whether "different subcontractors need to be [at the site] at the same time . . . or [whether] more than one subcontractor [must] be [at the site] by the time the project is completed" for the fourth element of the common work doctrine to be satisfied. In response, the trial court gave the following instruction: "The common work area is a situation where employees of a . . . number of subcontractors were all subject to the same risk or hazard. A high degree of risk if [sic] a significant number of workers *of multiple subcontractors* must exist when the plaintiff is injured." (Emphasis added.)[2] This instruction, in part, quoted footnote 12 of *Ormsby*. Footnote 12 of *Ormsby* provides: "The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Ormsby, supra* at 59-60 n 12.

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[1] Overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

[2] Although the trial court indicated this instruction was quoted from footnote 11 in *Ormsby*, the instruction actually quoted footnote 12.

The trial court's instruction did not directly address the issue raised by the jury question. Specifically, although the trial court added the words "of multiple subcontractors" to the language quoted in *Ormsby*, the instruction did not state whether different subcontractors must only eventually work in the area or must be working in the area at the time of plaintiff's injury to satisfy the fourth element of the common work area doctrine.

We note that it does not appear that *Ormsby* addressed this issue. Rather, *Ormsby* held that the retained control doctrine[3] is subordinate to the common work area doctrine. *Ormsby*, *supra* at 61. In arriving at this conclusion, the *Ormsby* Court addressed the fourth element of the common work area doctrine in footnotes 9 and 12 as noted above, which merely stand for the proposition that the same high degree of risk must be present to a significant number of employees of different subcontractors when a plaintiff is injured in order to impose liability on a general contractor. *Ormsby*, *supra* at 57 n 9, 59 n 12. Therefore, given that *Ormsby* did not directly address the issue at hand, the common work area rule that "merely requires that employees of two or more subcontractors eventually work in the area" remains applicable. *Hughes*, *supra* at 6.

We note that the trial court's instruction did not indicate that employees from multiple subcontractors must be exposed to the same risk at the same time for defendant to be held liable for plaintiff's injuries. However, the court's instruction failed to instruct the jury on the applicable law. Specifically, at trial, the court initially instructed the jury regarding the four elements of the common work area doctrine[4] and then proceeded to define the term common work area as "an area where a significant number of employees of multiple subcontractors may be exposed to risk of danger. It's a situation where a number of subcontractors were all subject to the same risk or hazard." When reinstructing the jury, the trial court defined common work area as "a situation where employees of a . . . number of subcontractors were all subject to the same risk or hazard. A high degree of risk if [sic] a significant number of workers of multiple subcontractors must exist when the plaintiff is injured."

On its face, the reinstruction was nonresponsive to the jury's question. In fact, it is difficult to discern from the reinstruction what the trial court meant by its reference to "a significant number of workers of multiple subcontractors . . . ." In contrast to the reinstruction, footnote 12 of *Ormsby*, on which the trial court based the reinstruction, only stated that "[t]he high degree of risk to a significant number of workers must exist when the plaintiff is injured"

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[3] The retained control doctrine provides that liability may be imposed upon an owner of a project who retains control of the work in such a way that he or she has "stepped into the shoes of the general contractor." *Ormsby*, *supra* at 54.

[4] Regarding the elements of the common work area doctrine, the trial court stated:

> And to establish the liability of a general contractor the plaintiff must prove, first of all, that the defendant contractor failed to take reasonably – reasonable steps within its supervisory and coordinating authority to guard against readily observable dangers . . . that created a high degree of risk to a significant number of workmen . . . in a common work area.

and did not address whether multiple contractors must be at the site at the same time a plaintiff is injured. *Ormsby*, *supra* at 59 n 12. Also, although not part of the reinstruction, it is worth noting that in responding to defendant's objection, the trial court stated, "there's no question that various subcontractors have to be on the job at the same time and they have to be subject to the same risk." Thus, when read as a whole, the trial court's reinstruction failed to adequately and fairly state the law in response to the jury's question. *Case*, *supra* at 6.

Further, even though plaintiff was required to satisfy each element of the common work area doctrine to prevail, *Ormsby*, *supra* at 59 n 11, it is impossible to know which element or elements the jury found dispositive in reaching its verdict. Thus, it is possible that the jury could have found that plaintiff only failed to satisfy the fourth element, on which it was erroneously instructed. "While not all instructional error requires reversal, reversal is mandated where the result might well have been different without the error." *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 392; 385 NW2d 797 (1986). Therefore, because permitting the erroneous instruction to stand would be inconsistent with substantial justice, we must reverse and remand for a new trial. *Case*, *supra* at 6. Because of our resolution of this issue, we need not address plaintiff's remaining claim of error.

On cross appeal, defendant argues that the trial court erroneously denied its motions for summary disposition and motion for a directed verdict. We disagree. We review de novo an appeal from an order granting summary disposition pursuant to MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

We also review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). The Court "reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed." *Id.* Any conflict of evidence is resolved in the nonmoving party's favor. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005).

On appeal, defendant argues that the trial court should have granted its motions for summary disposition and motion for a directed verdict because plaintiff failed to show that there was a high degree of risk to a significant number of workers in a common work area. We disagree. At the outset, we note that it is not clear how many workers constitute "a significant number of workmen." *Ormsby*, *supra* at 54. While *Ormsby* explained that a significant number of workmen is certainly more than one worker, *Id.* at 59 n 12, *Hughes* found the presence of four workers did not constitute a significant number of workmen as a matter of law, *Hughes*, *supra* at

7-8. Thus, plaintiff must show minimally that more than four workers were in a common work area to survive defendant's motion on this issue.

Here, plaintiff explained that, on the morning of his fall, he was one of eight or nine workers on the roof – four, including himself in his section and four or five in another section. Further, plaintiff noted that at the time of his fall, his foreman, Tom Maddock, had just climbed to the roof to tell plaintiff and the other workers to get off of the roof because of the weather conditions. Thus, plaintiff has shown that at least eight to ten men were on or around the roof when he fell. Moreover, Jay Parks, defendant's president, admitted that he was aware that Conquest's employees were working on the roof without fall protection even though fall protection was required for this type of work. Therefore, viewing this evidence in the light most favorable to plaintiff, a genuine issue of material fact existed regarding whether plaintiff had shown that a high degree of risk to a significant number of workmen existed at the time of his injury. *Ormsby, supra* at 59 n 12.

Regarding whether plaintiff's injury occurred in a common work area, we reiterate that "the common work area rule merely requires that employees of two or more subcontractors eventually work in the area." *Hughes, supra* at 5-6. Here, Dennis Warren, a supervisor for defendant, explained that although no other subcontractors worked on the roof simultaneously with the carpenters, the roofers would work on the roof after the carpenters were finished. Therefore, because there was evidence that at least one other subcontractor besides Conquest would eventually work on the roof, there is at least a genuine issue of material fact concerning whether plaintiff was injured in a common work area. Therefore, the trial court did not err when it determined that summary disposition and a directed verdict on this basis was not warranted.

We affirm the trial court's denial of defendant's motions for summary disposition and for a directed verdict. However, we reverse the judgment for no cause of action and remand for a new trial consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto